

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 104 of 1990****For Approval and Signature:****HONOURABLE MR.JUSTICE C.K.BUCH**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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NATHUBHAI MOTIBHAI PATEL & 1 - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR AD SHAH for Appellant(s) : 1 - 2.

MR AJ DESAI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH**Date : 11/05/2007****CAV JUDGMENT**

1. The appellants are the original accused of Special (ACB) Case No.48 of 1988 (hereinafter referred to as 'the accused') who have been held guilty of the charge of offence punishable under Section 161 of the Indian

Penal Code and also for the offence punishable under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 (hereinafter referred to either as 'the Act').

2. The learned Special Judge, City Civil Court, Ahmedabad, after hearing learned counsel for the parties, vide judgment and order dated 20.12.1989, convicted and sentenced both the accused and imposed identical punishment for both the offences. The appellants have been sentenced to undergo 2 years RI and to pay a fine of Rs.3,000/- and in default to undergo RI for 9 months for the offence punishable under Section 161 of the Indian Penal Code and to undergo sentence of 2 years RI and to pay a fine of Rs.3,000/- and in default to undergo RI for 9 months for the offence punishable under Section 5(1)(d) r/w. Sec.5(2) of the Act.
3. Both the accused have assailed the legality and validity of the judgment and order of conviction and sentence dated 20.12.1989,

directing the present appeal under Section 374 r/w. Sec.386 of the Criminal Procedure Code. The judgment is assailed on various grounds mainly mentioned in para 6 of the memo of appeal and Mr.Shah has taken us through the main grounds of challenge during the course of oral submissions.

4. The accused No.1 was a Police Constable attached to Naroda Police Station and accused No.2 was a Head Constable in the same police station. Pending the appeal, original accuse No.2 i.e. appellant No.2 has expired and now his son, Indraajitsinh Rathod is proceeding with the appeal, as per the order dated 27.10.2005 passed by this court in Criminal Misc. Application No.11343 of 2004. However, Mr.Shah has clarified that Shobhanaben, widow of the deceased is still there and she is one of the legal heirs along with her two sons and two daughters. Applicant-Indraajitsinh had prayed that he may be permitted to proceed with the proceedings, but it should be construed that the widow - Shobhnaben also is

with the applicant and none of the heirs has decided to give up the stand taken by the deceased - original appellant No.2.

5. I have heard Mr.A.D.Shah and learned APP Mr.A.J.Desai, at length. Before entering into the details of the submissions made before the Court by both the learned counsel for the parties, it would be appropriate for the court to state the basic story of the prosecution that was placed before the Trial Court.
6. It is the case of the prosecution that one Sales Tax Inspector had filed a complaint against (1) Premjibhai, (2) Laxmanbhai Premjibhai, and (3) Ms.Laxmiben Ambalal for the offences punishable under Section 78 of the Sales Tax Act at Naroda Police Station on 5.12.1986. The allegation against the accused in the complaint made by the Sales Tax Officer was that the accused persons have not paid the Sales Tax amount to the tune of Rs.55,820/- and thereby committed breach of Sales Tax

Rules 31 and 32 punishable under Section 78 of the Sales Tax Act. This complaint was registered as CR No.361 of 1986 and the investigation was handed over to original accused No.2, who was the Head Constable. One of those 3 accused persons named in the complaint filed by the Sales Tax Inspector, Laxmanbhai Premjibhai Patel, is the complainant in the present case. Complainant Laxmanbhai along with other two persons was running business of timber in the name and style of 'Jai Hind Timber Mart' and the same was situated near Galaxy Cinema. According to the prosecution, accused No.1 had gone to the business premises of the complainant on 8th December and inquired about the partners and informed that he had come from Naroda Police Station as there was a Sales Tax case wherein the partners were required to be arrested and thereafter they may be taken on remand. The accused No.1 thereafter instructed the complainant to keep the partners present on the next day. But on 8th of December, the name

of accused No.1 was nor revealed.

7. One Sureshbhai, an advocate, was looking after Sales Tax matters of the complainant firm and, therefore, the complainant contacted his advocate Sureshbhai and called him at his office on 9th December. As nobody had turned up from police station on the next day i.e. on 9th December, the complainant and his advocate Sureshbhai decided to go to Naroda Police Station and inquired about the case through the police officer present in the police station. The officer present in the police station had informed the complainant that they should remain at the office and the work will be completed by Police at that place only. The complainant realized at that time that the police constable, who had come to his office / business premises on 8th December was not present at the police station. Thereafter, both of them came out of the police station and they went away. Both of them had paid visit at about 3.00 p.m. at Naroda Police

Station and at about 3.30 p.m, two police personnel had reached the office of the complainant. One of the police personnel was having a file bearing a slip in the name of Somabhai Patel. The complainant inferred / believed that one of these two police personnel was Somabhai Patel, but he was not able to gather from the two police personnel that who is Somabhai and what is the name of another policeman. The accused No.1 then asked the complainant to keep all partners present so that the necessary work can be completed. The complainant was informed that partners were to be taken on remand and when the complainant told both the police personnel that father of the complainant was quite aged and may not be in a position to undergo remand. In reply to it, the policemen told the complainant to keep him present without fail. It is alleged that Police had insisted the woman named Laxmiben Ambalal present there and declared the intention to take her also on remand. The complainant was threatened by the

police personnel that they can do whatever they like after the arrest and the remand order was passed. At that time, the police personnel were informed by the complainant that Laxmiben was wife of his younger brother and such remand should not be asked against her. The complainant was manhandled and then he was given a hint that the complainant should understand the matter and when complainant inquired what he was required to do, the police personnel allegedly made a demanded of Rs.5,000/-. It was further alleged that after some bargaining, the police personnel reduced the demand to Rs.3,000/-. As the police personnel were insisting for this amount, the son of the complainant went out and arranged for Rs.1,200/- and that amount was paid to the policemen, who had come on 8th December. At that time, the complainant was asked to keep the remaining amount of Rs.1,800/- ready and he was informed that the same person, who had accepted Rs.1,200/-, will come on the next day at about 9.30 a.m for

collecting the remaining amount. At that time also, accused had insisted to keep all partners and two witnesses present. When the complainant informed that it will not be possible to arrange for Rs.1,800/- in such a short period and the same can be arranged after opening of the bank and, therefore, the accused persons agreed to come at 11.30 a.m.

8. According to the prosecution, the complainant had no desire to make the payment and, therefore, on the next day, he left his place for 'darshan' at 'Camp Hanuman'. It was alleged that son of the complainant had gone to his office and when the complainant returned in the auto-rickshaw from 'Camp Hanuman', he went to 'Gayatri Temple' and at that time he saw the board of Anti-Corruption Bureau. Instead of going to Gayatri Mandir, the complainant went to the office of Anti-Corruption Bureau (hereinafter referred to as 'the ACB'). It is the say of the prosecution that the complainant contacted his son on telephone and learnt that two policemen had

come and they were to come again at about 3.30 p.m. It is the say of the prosecution that the complainant had filed a complaint before the ACB and Police Inspector Mr.G.K.Desai, after calling Panchas and performing necessary tests of anthracene powder, arranged for a trap. Thus, on 9th December, the demand of Rs.5,000/- was initially made by the accused persons, but ultimately, it was reduced to Rs.3,000/- for showing favour of not seeking remand after arrest in a case instituted by Sales Tax Department at Naroda Police Station. At the time when the initial demand was made, the amount of Rs.1,200/- was paid and the amount was arranged by Sureshbhai Laxmanbhai Patel, son of the complainant. According to prosecution, Rs.800/- were collected from one of the friends of Sureshbhai and Rs.400/- were paid by his mother. These notes were in the denomination of Rs.50/- and Rs.20/- and also in other denominations. The date of the complaint was 10th December and the same has registered at 11.00 a.m. The members of the

raiding party had reached to the office of the complainant and waited at the office. Both the accused came at the office one after another. Accused No.2 completed the procedure of obtaining signatures of surety on that day i.e. 10th of December. But, the accused left the place without making any demand and as the demand was not made, there was no scope for the complainant to offer the amount of bribe. Thereafter, both the accused did not turn up till 6.30 p.m and the trap officer decided to give up the attempt and second part of Panchnama was completed showing the trap as 'unsuccessful'.

9. It is alleged that on 10th of December accused No.1 went to the residence of the complainant at about 9.00 p.m and suddenly made the demand. The complainant expressed his inability to make payment and the accused No.1 was told that the amount collected by him for paying them now has been returned by him to the persons from whom he had borrowed and he does not have the amount with him. But, as

the complainant was apprehending hackle, the wife of the complainant took out Rs.800/- and handed over the same to accused No.1. The accused No.1, after accepting the amount of Rs.800/-, threatened the complainant that if he makes excuses in making payment, his life will be ruined and asked the complainant to pay the remaining amount of Rs.1,000/- on the next day.

10. It is the say of the prosecution that the complainant again contacted ACB Office on 11th of December and at that time P.I., Mr.Jadav was present. Mr.Jadav recorded further complaint and called Panch Witnesses, who were called by Mr.Desai on previous day. The complainant then produced Rs.1,000/- and after performing necessary test of anthracene powder, the raiding party reached at Jai Hind Timber Mart i.e. The office and business premises of the complainant. According to prosecution, on that day it was decided that amount of bribe may be paid on demand, by Sureshbhai, son of the complainant and Panch

No.1 was asked to be in the company of Sureshbhai as well as the complainant. It is alleged that accused No.1 came in auto-rickshaw and went in the chamber. It is alleged that accused No.1 inquired from Sureshbhai about the complainant. Sureshbhai then informed the accused No.1 that his father has gone out. According to prosecution, accused No.1 inquired as to what has been done in respect of money as agreed to be paid on previous night. According to prosecution, Sureshbhai informed accused No.1 that with great difficulty they had collected the amount and there should not be any harassment to his father and other partners in the case. According to prosecution, accused No.1 told that he will manage everything and while saying so demanded Rs.1,000/-. On this demand being made, Sureshbhai paid Rs.1,000/- smeared with anthracene powder (Muddamal) to accused. No.1. The accused No.1, after accepting the amount kept the same in his right side pant pocket. Thereafter, the

accused No.1 left the office premises of the complainant and sat in auto-rickshaw. At that point of time, Sureshbhai gave signal. By that time, the auto-rickshaw started, therefore, the members of the raiding party chased that auto-rickshaw. The Trap Officer had followed the auto-rickshaw by calling the jeep car, which was parked at nearby vicinity and the auto-rickshaw wherein the accused No.1 was there, was intercepted and stopped. The accused No.1 then was brought along with auto-rickshaw to Jai Hind Timber Mart. The currency notes of Rs.1,000/- smeared with anthracene powder were found from the pocket of the accused and after performing necessary panchnama, the raid was completed.

11. It is the case of the prosecution that the accused No.2 was called from Naroda Police Station and from his portfolio, three blank papers containing signatures of Panch No.1 as well as papers of Sales Tax Office were recovered. These documents were seized along with Muddamal currency notes. Seizure memo

was also prepared and the receipt for the same was passed over to the accused. It is alleged that accused No.1 had come in the auto-rickshaw bearing Registration No.GRS-3597 and this auto-rickshaw was driven by one driver named Dattatrey Sudama.

12. After successful trap, the search of the residence of both the accused persons was carried out and during the search of residence of accused No.1, one iron bag containing Rs.2,000/- was recovered. This amount was in the currency notes of different denominations. On completion of the investigation and obtaining necessary sanction required under the act, both the accused came to be charge-sheeted and at the conclusion of the Trial, both the accused were found guilty for the charges levelled against them.

13. Mr.A.D.Shah, learned counsel appearing for both the accused has taken this Court through the oral evidence of the following witnesses:

PW-1	Exh.8	Laxmanbhai Premjibhai Patel (Complainant)
PW-2	Exh.18	Sureshbhai Laxmanbhai Patel
PW-3	Exh.19	Dalpatbhai Somabhai (Panch Witness)
PW-4	Exh.27	Gobarbhai Khodabhai Desai (P.I., Trap Officer, who had arranged trap on 10.12.1986)
PW-5	Exh.28	Kanchan R. Jadav, P.I., A.C.B. and Investigating Office of the trap that was arranged on 11 th of December, 1986

14. Mr.Shah learned counsel for the accused and learned APP Mr.Desai have taken this court through the details of complaint Exh.9, Panchnama of unsuccessful trap dated 10th December Exh.20, Panchnama of successful trap dated 11th December Exh.23, receipt signed by accused No.1 dated 11th December Exh.21 and receipt signed by accused No.2 dated 11th December Exh.22.

15. Exhs.29 and 30 are sanctions to prosecute both the accused which are at page Nos.226 and 231 of the paper book. But, the sanction accorded by the authorities was neither seriously disputed before the Trial Court nor the legality and validity of both the sanctions have been disputed before this court. Panchnama Exh.20 of unsuccessful trap dated

10th December is a vital and important document considering the nature of charges levelled against accused No.2 because the demand of illegal gratification is also the offence independently punishable and such a public servant can be held responsible under Section 161 of the Indian Penal Code as the Scheme of the said section is concerned with the conduct of a public servant.

16. Arguments advanced by Mr.A.D.Shah can be decided mainly on the following six separate parts; the first part relates to the anthracene powder test carried out in the present case and the infirmity ultimately emerging from the oral as well as documentary evidence led in this regard and its effect. The second part covers the area of errors alleged to have been committed by the learned Trial Judge while appreciating the evidence of the complainant - Laxmanbhai and his son Sureshbhai. Third part is with regard to the infirmities that have emerged from the evidence of Panch Witnesses, including the

selection of Panch-Dalpatbhai Somabhai PW-3. Fourth part covers the area of improbabilities emerging from the evidence led by prosecution and the lack of transparency in the investigation that has resulted into serious prejudice to the accused persons, including certain contradictions and omissions that have emerged as contradictions or conflicts in the evidence of Prosecution Witnesses examined or not. Fifth part is in the nature of alternative argument and it is submitted that the learned Trial Judge has not cared to consider one crucial aspect and, that is, whether the prosecution has proved the accusation against both the accused with the same quality and quantity of evidence and whether the accused No.2 could have been given benefit of doubt as he was not present on any subsequent date that of 9th December when the amount of Rs.1,200/- was allegedly recovered by both the accused persons, in absence of any corroborative piece of evidence to the version of the complainant. The sixth part of the

argument covers the effect of non-examination of some important witnesses i.e. advocate Sureshbhai and auto-rickshaw driver Dattatrey Sudama and Panch No.2, who had seen accused No.2 accompanying accused No.1 on 10th when the signature of Panch No.1 was obtained on one paper as person surety to the accused named in the case registered by Sales Tax Officer, especially, when the offence registered under the Sales Tax Act is a bailable offence.

17. According to Mr.Shah when the evidence of complainant about his first visit to the ACB office on 10th December, 1986 sounds unnatural and highly improbable, and the evidence of complainant and his son form infirmities as regard to arranging an amount of Rs.1,800/- and thereafter approaching the office of ACB again saying that now amount of Rs.1,000/- has been demanded, throws the case of the prosecution behind thick cloud of doubt. As the evidence as to the presence of anthracene powder on the hands and cloths of accused No.1

also does not sound the ring of truth, both the accused ought to have been acquitted by the learned Trial Judge. The appeal, therefore, requires to be allowed and consequently the accused are required to be acquitted.

18. The arguments of Mr.Shah have been seriously resisted by learned APP Shri A.J.Desai. According to Mr.Desai, this case is with regard to highly corrupt police officials, who have attempted to extort money in a case registered in their police station, which was undisputedly a bailable offence. While replying to each argument advanced by Mr.Shah, Mr.Desai learned APP has developed the following points :

19. The improvements made by complainant or some inconsistencies found in the evidence of complainant as well as his son Sureshbhai are easily separable and if these exaggerations / improvements are considered, they are

insignificant in nature unless the court reaches to the conclusion that improvements made by Prosecution Witnesses affect adversely to the case of the prosecution or the veracity of the witnesses examined, then only it can be said to be infirmity in the evidence. As per the settled legal position the Trial Judge through the fact finding machine is supposed to try to separate wheat and chuff. When it is not possible, then such improvements and exaggerations should be ignored. While dictating the complaint, the complainant is not supposed to divulge each word of version or the conduct of the accused putting them minutely in the complaint, so the consistency in the basic story put forth by the complainant vis-a-vis, his deposition in the court should be looked into and the learned Trial Judge cannot be said to have committed any error in appreciating evidence of complainant Laxmanbhai or his son Sureshbhai. According to Mr.Desai, the complaint is in two parts. The details given to the Trap Officer,

P.I., Mr.Jadav, is also a part of FIR and this could have been read as a corroborative piece of evidence. The first complaint is regarding demand of Rs.1,200/- by the accused persons and the subsequent story of acceptance of the amount by accused No.1, paying visit at the house of the complainant and second part of the complaint is regarding demand of Rs.1,000/-. This further complaint was produced vide Mark 7/3. This document has not been exhibited formally, but as the contents of the document Mark 7/3 have been proved, this court should consider this document in evidence.

20. According to Mr.Desai, even for the sake of argument, if the document 3/7 is not considered as part of complaint i.e. FIR, then also the same does not affect the substratum of the story placed by the prosecution. On the contrary, the version of the complainant and his son Sureshbhai emerges as story consistent to the case placed by the

prosecution. Amount of Rs.1,000/- accepted by accused No.1 was recovered immediately by the Trap Officer in the presence of Panch. PW-2 Sureshbhai and PW-3 Dalpatbhai when have satisfactorily proved the demand of bribe by accused No.1, then the recovery of Muddamal i.e. currency notes of Rs.1,000/- from accused No.1 becomes significant. Direct evidence of these two witnesses corroborated by P.I., Mr.Jadav is sufficient to hold the accused No.1 responsible for acceptance of illegal gratification by misusing his status, as observed by Hon'ble Supreme Court, to bring home all the charges punishable under Section 161 of the Indian Penal Code, the prosecution requires to prove that the person, who has accepted the gratification is a public servant, he himself has accepted the gratification and the gratification is accepted as a motive or reward for rendering or attempting to render any service or the service to any person. So, keeping this law in mind the learned Trial Judge has

appreciated the evidence. Initially, amount of Rs.1,200/- was recovered by both the accused and out of the remaining amount of Rs.1,800/- from the originally reduced amount of Rs.3,000/-, the amount Rs.800/- was recovered by the accused on 10th of December. Of course, the wife of the complainant has not been examined. But, no declaration was required to prove these facts when two different prosecution witnesses viz. the complainant and his son were competent to prove the fact of visit of accused No.1 at the residence of the complainant on 10th of December between 8.30 and 9.00 p.m., the defence cannot accept nor the prosecution is obliged to examine all witnesses to prove one fact. It has come in evidence that on two different occasions wife of the complainant had arranged for money. This evidence impliedly corroborates the evidence as to the success of the trap and recovery of Rs.1,000/- from Accused No.1. It is clear from the evidence that one of the accused had recovered

Rs.800/- in the period in between i.e. between the day of acceptance of Rs.1,200/- and actual date of trap. Otherwise, Rs.800/- would have remained unpaid till the date of the trap when the prosecution has proved that accused No.1 is the person who has accepted Rs.800/- on 10th of December and that only tempted probably, the complainant to approach the ACB officer again on 11th December. The act of approaching the ACB again on 11th December makes the case of the prosecution probable after reading the evidence of P.I., Mr.Jadav (Page Nos.206 and 207 of the paper book). It is submitted that this witness has satisfactorily proved the recovery of the amount of Rs.1,000/- from the accused No.1. It is true that document 7/3 was neither read over nor showed to the complainant and the complainant has not even attempted to tender document Mark 7/3 in evidence, but the contents which are the story of the prosecution have come on record and the resultant effect is that it is not possible to discard the version of the complainant. No

material contradictions or improvements are found in the deposition of the complainant as regards to the further statement given by him on 11th December morning. Thus, the trap was laid on 11th of December on the facts stated by the complainant to P.I., Mr.Jadav.

21. Change in Investigating Officer or calling the same Panch by P.I., Mr.Jadav while laying the trap on 11th December, would not make the prosecution case bad or weak. Merely because the same panchas are called, it would not be either legal or safe for the court to draw the inference that panchas were selected and, therefore only, they were continued and recalled at the time of making second attempt. According to Mr.Desai, one more substantial evidence that has come on record is the recovery of one chit from appellant No.2 which links both the accused with the crime. It is true that Sureshbhai, son of complainant, could have given the green signal immediately on acceptance of amount and the delay in

giving the signal is a conduct of PW-2 Sureshbhai, which may go against him and this itself would not make the witness- Sureshbhai unreliable witness. The evidence led by prosecution clearly suggests that the business premises of the complainant was cornered by two other members of the raiding party. To give signal, Sureshbhai was required to come out of his office and it might have happened that he might have given the signal after coming out from his table in the office, and perhaps P.I., Mr.Jadav may not have taken notice of the signal given by Sureshbhai. Ultimately, the person who had accepted the bribe was a police official. So his movement out of the business premises of the complainant with Muddamal currency notes and calling auto-rickshaw brought by him only makes the prosecution case more stronger. This is a case wherein there is no even remote possibility to infer possible planting or surreptitiously passing of bribe money against wish and will or mens rea on the part of the

accused. There is no material infirmity in the evidence of Sureshbhai and P.I., who himself along with his team chased the auto-rickshaw of accused No.1. Merely because Mr.Jadav, P.I. had some problem in the leg because he met with some motor vehicle accident in past, would not make the presence of Mr.Jadav doubtful at the spot and his act of chasing the accused in the jeep car which was parked in close vicinity.

22. Of course, no specific time for accepting the bribe amount was fixed, is the impression created, but going through the evidence led by prosecution, it clearly reveals that the complainant was anticipating the visit of both accused persons or any one of them any time after 10.30 a.m.

23. According to Mr.Desai, there is no substance in the argument advanced that panchas were selected and, therefore only, they were repeated and again called by P.I., Mr.Jadav

for conducting raid on 11th December. He ought to have called other independent persons as panchas. In the same way, when Mr.Jadav and Mr.Desai both were sitting in the same building and when the P.I., Mr.Desai had authority to conduct a raid within city limits of Ahmedabad, he could have continued the exercise of laying trap again on 11th of December also. It was explained by Mr.Desai as well as Mr.Jadav in their depositions that under which circumstances, Mr.G.K.Desai had laid a trap on 10th December. There is nothing on record to show that P.I., Mr.Jadav was present and available for work to lay down the trap on 10th December. When the complainant had approached Mr.Desai, and when there is nothing on record to show that Mr.Jadav was available for the work of laying trap, the exercise undertaken by Mr.Desai could not be considered as unauthorized act. P.I., Mr.Jadav was the authorized officer to lay trap within the city limits of Ahmedabad. Two officers of the rank of Police Inspectors were

there and Mr.Desai was having authority to lay a trap in the city limits and Mr.Desai was entrusted with some other work in the rural area, but both are the officers of Anti-Corruption Bureau and both were authorized to lay trap. Mr.Desai has taken us through the relevant portion of evidence at page Nos.107 and 203 as well as the part of the evidence which is there in paras 14 and 15 of the deposition of PW-5 P.I., Mr.Jadav at page 220. Mr.Jadav has stated that on 10th December, he was busy in an ACB trap arranged by him in case of a public servant named Mr.Patel working as a Recovery Officer of a Cooperative Bank. He has also stated that he had returned in the office at about 8.00 p.m. and at that time, P.I., Mr.G.K.Desai was not there in the office. According to Mr.Jadav, P.I., Mr.G.K.Desai was authorized to lay trap within city limits of Ahmedabad, but he was supposed to seek oral permission from the Assistant Director and for such permission, no official record is being maintained. So on 11th

December when accused No.1 was caught for accepting illegal gratification of Rs.1,000/-, Mr.Jadav had arranged the trap as per authority and as he was available for the work. The act of handing over papers by Mr.G.K.Desai to the office of Mr.Jadav clarifies the contingency and this fact has come on record, which makes the evidence of Mr.Desai as well as Mr.Jadav reliable in this regard.

24. The Trial Judge was supposed to see and evaluate whether the version of the complainant is natural and if the answer is in affirmative, then this court at the most could have tried to seek some corroboration on this aspect. Here, in the instant case, complainant Laxmanbhai and his son Sureshbhai were two witnesses available. On account of failure of trap on first occasion, Mr.Jadav may have opted to replace Sureshbhai vice the original complainant Laxmanbhai. There may be any reason, but while leading proof as to the

demand and acceptance of illegal gratification, prosecution can place reliance on the evidence of Sureshbhai as substantial piece of evidence and the version of complainant Laxmanbhai as a corroborative piece of evidence.

25. There is sufficient evidence direct as well as substantial to show that both the accused were there when amount of Rs.5,000/- was demanded as illegal gratification and it was ultimately reduced to Rs.3,000/-. There is evidence on record to show that accused No.2 was present when Rs.1,200/- was accepted against demand of Rs.3,000/-. Infirmities based on imagination for sheer logic as to how the amount required to be given in bribe was collected or why an amount of Rs.1,800/- was not re-used on 11th December and why the persons who had contributed to pay up the amount demanded by the police officials, have not been examined etc. are the questions which are not required to be answered in detail by prosecution.

These questions are not capable of being pointed out any unexplainable improbability. According to Mr.Desai, this factual narration does not pose any type of improbability. The documents seized from the portfolio of accused No.2 which were not before the court with the list Exh.22 speak for themselves. These are all Muddamal articles. When the complaint filed by Sales Tax Officer was for a bailable offence, then why the forms were left incomplete is a question. Accused No.2 had obtained signatures of panchas as surety because the accused were not aware that the person whose signature they are obtaining as surety at the instance of the complainant in reality is a Panch planted by the Trap Officer. But, at least it is possible to infer that though the accused could have been enlarged on bail on 10th December instant, conduct of leaving the place with incomplete documents viz. bail bonds etc., should be seen as a significant factual situation and this factual situation itself creates a

circumstance which goes against both the accused. Mr.Desai has drawn my attention to Exh.13 which bears signatures of Bhupatbhai Somabhai Patel, but it does not bear the signature of accused Laxmanbhai for whom personal bond of Rs.1,000/- was prepared. This document was found from the portfolio of accused No.2 on 11th December, 1986. Exh.14 is the bail bond signed by Bhupatbhai Somabhai Patel for accused - Premjibhai Ratansinhbhai Patel, but the signature of Premjibhai Ratansinhbhai Patel is not there on the personal bond of Rs.1,000/- . Exh.15 is found blank. However, there is name of Dalpatbhai Somabhai Patel with other details of his residence etc. and so also with the signature of Dalpatbhai. Why this document was left blank? According to Mr.Desai, it is also a question. Though the signature of Dalpatbhai Somabhai Patel was obtained, accused No.2 had not put up his signature as to show that he has signed before accused No.2. Mr.Desai has also pointed out that these three documents

have been received in evidence at the instance of the advocate appearing for the accused and he has pointed out the proceedings of 10th October, 1989 drawn during the trial. The signature of surety was obtained, then why signature of the accused of that crime viz. the complainant was not obtained on personal bond simultaneously, is the question. Why the accused No.2 had not put up the dates on these documents. This incomplete document and other documents clearly corroborate substantially the version of complainant as well as Sureshbhai and the learned Trial Judge has rightly held both the accused guilty. According to Mr.Desai, merely because when amount of Rs.800/- was taken by accused No.1, accused No.2 was not present or on the day of trap i.e. 11th of December accused No.2 was not present are not circumstances sufficient to draw any inference that the accused No.2 may not be involved in obtaining illegal gratification and that he does not deserve any benefit of doubt. One document recovered from

the portfolio of accused No.2 establishes the link between him and the auto-rickshaw driver Dattatrey and there is sufficient evidence to show that this very Dattatrey has brought accused No.1 at the business premises of complainant on 11th December and the very auto-rickshaw was intercepted and brought back to the business premises of the complainant. The statement of auto-rickshaw driver Dattatrey has been recorded in the present case.

26. When there is no infirmity in describing the presence of anthracene powder, it is possible for this court to record a clear finding that the evidence as to the use of anthracene powder and marks of the powder on the hand, pant etc. is not material because no corroboration of the evidence of scientific nature is necessary. In the present case, according to Mr.Desai, there is enough evidence of reliable nature of complainant - Sureshbhai and panch witnesses, corroborated by P.I., Mr.Jadav, the evidence led by

prosecution as to the presence of anthracene powder marks become insignificant and this court should not view the case of the prosecution with any shadow of doubt.

27. Mr.Desai has also drawn the attention of this court as to the length of the cross-examination of each witnesses mainly the complainant and panch and so also of Sureshbhai and has submitted that the evidence of these three witnesses should be evaluated keeping all these aspects in mind.

28. To appreciate the rival contentions placed before the court, it is necessary to narrate the depositions of the witnesses relied upon by the prosecution. It is true that as and when it is necessary the court is supposed to mention the facts stated by a particular witness. But verbatim reproduction of the same is not required in the present case. It would be beneficial to discuss and evaluate the evidence which has been read over before the

court. The court also cannot ignore that the depositions of all the five witnesses is comparably very lengthy, but it is easy for the court to evaluate the evidence of each witness individually.

29. I have gone through the judgment under challenge and so also the detailed appeal memo submitted by the accused. Appeal memo practically covers all the arguments that have been advanced by Mr. Shah learned counsel for the accused. This court may not agree with ultimately some of the inferences drawn or the observations made by the learned Trial Judge while holding the accused guilty. But, still the court can ascertain whether the ultimate finding of guilt is sustainable in the eye of law or not. Of course, the facts were materially different. But, ultimately the ratio of the decision if is found applicable, then the same can be considered by the court. This court can uphold the finding adopting the reasons assigned by learned Trial Judge while

dealing with the appeal. In the same way, the court may not express agreement with all reasons assigned by learned Trial Judge for recording ultimate finding of guilt, but may agree that some of the findings and inferences drawn by the Trial Court expressing disagreement simultaneously with some part of the judgment and pass appropriate orders either confirming or reversing it. The third situation is that whether this court ignoring the main reasons assigned by learned Trial Judge holding the accused guilty, can re-write the entire judgment on the evidence and can confirm the ultimate finding of guilt recorded by the learned Trial Judge for the reasons that may be assigned by this court or not. The powers vested with the court while dealing with the appeal under Section 374 r/w Section 386 of the Criminal Procedure Code are very wide as observed by the apex court in case of **Padam Singh, Appellant v. State of U.P., respondent reported in 2000 CRI.L.J. 489** that:

“It is the duty of an appellant Court to

look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the Appellate Court in drawing inference from proved and admitted facts. It must be remembered that the appellate Court like the trial Court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in a trial Court. The judicial approach in dealing with the case where an accused is charged of murder under X. 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding conviction".

30. To buttress the say, I would like to reproduce the relevant paras of the judgment simultaneously saying that there are number of judgments re-writing the similar principle / ratio.

31. One of the questions which may need consideration is that as the accused No.2 was

not present at the time when the Muddamal currency notes were accepted as gratification by accused No.1, whether presumption as to the acceptance of the illegal gratification can be raised also against the accused No.2 or not. Keeping the language of the charge framed by the learned Trial Judge in mind, which is at page 21 of the paper book, this court shall have to comment on the points agitated. For the sake of convenience, I would like to reproduce the relevant paras (2) to (6) of the charge (Exh.2) framed by the Trial Court, as under:

"CHARGE Nos.2 to 6

2.That on 09.12.1986, that you both the accused, in collusion with each other, demanded illegal gratification (bribe) of Rs.5,000/- from the complainant herein named Laxmanbhai Premjibhai Patel for not effecting his arrest and seeking his remand in connection with criminal complaint being I CR No.361/1986 registered with Naroda Police Station and

ultimately you both the accused agreed to accept an amount of Rs.3,000/-. That on the same day i.e. On 09.12.1986, you both the accused persons accepted Rs.1,200/- against the said amount and agreed to accept the balance amount of Rs.1,800/- on 10.12.1986.

3.That on 10.12.1986, you accused No.1 had gone to the residential house of the complainant and demanded balance amount of illegal gratification and so the complainant gave an amount of rs.800/- and intimated you accused No.1 to come and collect the balance amount of Rs.1,000/- on 11.12.1986 and accordingly, you accused No.1 accepted bribe amount of Rs.1,000/-

4.Thus, you both the accused persons, in the capacity of the public servants and with a view to favour (to give advantage) the complainant, obtained benefit from him by receiving the amount other than

legal remuneration and, thereby committed an offence punishable under section 161 of the Indian Penal Code.

5.Further, on the same date, time and place and in the manner aforesaid, you both the accused demanded the amounts in the manner as aforesaid from the complainant and thereby misusing/abusing your position as public servants obtained aforesaid amounts by corrupt or illegal means and thereby you both the accused have committed an offence punishable under section 5(1)(d) read with section 5(2) of the Prevention of Corruption Act, 1947.

Alternatively

6.You both the accused, on or about 09.12.1986, with a view to fulfill the common intention (in furtherance of common intention) of committing the aforesaid offence, you both the accused accepted an amount of rs.1,200/- on that

day, and that you accused No.1 accepted an amount of Rs.800/- on 10.12.1986 and further that you accused No.1 accepted an amount of Rs.1,000/- on 11.12.1986. Thus, you both the accused obtained the amounts on the dates and in the manner as aforesaid during the said transaction and, thereby you both the accused have committed an offence punishable under section 34 read with section 161 of the Indian Penal Code and section 5(2) of the Prevention of Corruption Act, 1947".

32. Para 1 of the charge is not required to be mentioned here because it is not disputed by the accused that they were public servants and were serving as Police Constable and Police Head Constable respectively in the city of Ahmedabad under Naroda Police Station and thereby they were public servants. It is also not disputed that accused No.2 was entrusted with the complaint filed by the Sales Tax Department and that the offence is undisputedly a bailable offence. The stand

taken by accused No.2 that this may be a case of mistaken identity qua him is also not found convincing because it is the say of the prosecution that when the accused had visited the complainant, police was holding one portfolio and the cover of the portfolio was bearing the name of Somabhai Naroda Police, Ahmedabad City. When the Head Constable accused No.2 was called after catching hold the accused No.1, Nathubhai, Police Constable, the accused No.2 had come with one portfolio and that portfolio was also bearing some name. Accused persons have been identified satisfactorily and mainly by PW-2 - Sureshbhai during the course of his deposition in the court. The evidence as to the identity of accused persons has put to the test of the cross-examination. Therefore, there is no question of mistaken identity even qua accused No.1-Narottambhai Patel. None of these two accused is Somabhai. Merely because the name of Somabhai is referred to while placing the case before the court it does not make the

case of the prosecution doubtful. Exh.22, receipt, is an important piece of evidence wherein at Sr. No.1 the portfolio has been referred to as Article No.1 bearing the name of Somabhai Mavjibhai Patel though it was found in the hands of accused No.2. According to PW-1, Laxmanbhai, on 8th December at about 2.00 to 2.30 p.m, one police personnel who was in a private dress had come to his business premises and he had intimated that they will come again on the next day and the complainant should keep all the partners present because on account of the complaint registered, they may be arrested and also may be taken on remand. According to PW-2 Sureshbhai this police official was holding one portfolio bearing name of Somabhai Patel, but thereafter he had disclosed his identity and told that he is Nathubhai. On 9th, of December both the accused had gone to the business premises of the complainant and at that time accused No.2 was also there and the portfolio that was seen on that day is found recovered during the

course of investigation and drawing of second part of panchnama from accused No.2. This part is reflected in the receipt Exh.22, a crucial document signed by both the panchas. So, as such, there is no question of mistaken identification.

33. The chit found from the papers seized from accused No.2 indicates that driver Dattatrey Maratha was asked to see Head Constable Gandaji i.e. accused No.2 in room No.2 in the morning at 7.30 along with auto-rickshaw. So, on 10th December i.e. on the date on which the trap had failed, an attempt to call this very rickshaw with driver was made. Surprisingly, this chit has been recovered on 11th December. It is well said by our courts that every criminal either leaves some evidence or carries some evidence with him in most of the cases. If the court draws the inference that on the day of trap i.e. on 11th December rickshaw must have been provided by accused No.2 to accused No.1, then whether such an

inference can be said to be based on conjectures and surmises or a reasonable inference. Without entering into this controversy, at least this court can easily say that non-examination of driver Dattatrey or carrying out test with U.V. lamp would not affect the merit of the case. On the contrary, this circumstance bring the accused No.2 closure to accused No.1 as the case of the prosecution is that amount of bribe was demanded by both the accused and acceptance of amount of Rs.1,000/- on the day of the trap was the amount against demand made by both the accused.

34. When it is not a matter of dispute that complainant and his partners were branded as accused in a complaint filed by Sales Tax Department in respect of a bailable offence, then there was no scope of arrest of the accused or praying for police remand. At the most, on the failure of obtaining bail, the police may produce the accused persons before

the Magistrate and in that case police will not get even time of 24 hours. The question of custodial interrogation does not arise at all. There is consistent evidence without any material contradiction that business premises of the complainant was visited by police personnel from Naroda Police Station in connection with the offence registered on the strength of the complaint given by Sales Tax Department. True it is that the prosecution is supposed to prove its case and the accused can keep his mouth shut. But, when the conduct of the accused comes as a factor relevant, then every conduct of the accused can be looked into and if it is found helpful to the prosecution, then the prosecution can make use of it while developing its case. Here it is not the say of the accused that either on 8th or 9th December the complainant was informed that the offence registered against him and other partners is a bailable offence. They should come to police station with surety for each of the partner accused

and on execution of the bail bond they will be freed and failure on part of any of the partners in giving surety / bail, that particular partner can be arrested and taken to the nearest Magistrate forthwith. It is not the case of any of the accused in the statement recorded under Section 313. It was legally possible for the accused mainly accused No.2 to direct complainant and any partner available to furnish bail immediately without waiting for a minute and on failure of producing surety or signing personal bond, the complainant and the partners available could have been arrested by him, but he has failed in doing so on both the days i.e. 8th and 9th December. At the time of raid, even bail bonds were not found prepared for all three partners. On the contrary, it was possible for this court to come to the conclusion that the accused were under legal obligation to inform and suggest the complainant to keep the surety present and they would complete the formality on the next day if sureties of each

partner are made available when the accused persons were not interested otherwise in arresting any of the partners on their first visit. There is sufficient force in argument of Mr.Desai that why the documents were left incomplete on the day on which the signature of one of the Panchas was obtained as surety on behalf of the accused. As discussed earlier, there was no reason for the accused for not obtaining signature of the complainant and the other partners who were present on the personal bond that were prepared. This conduct of the accused is found contrary to their legal obligation because the police officials were entrusted and investigation on a tax offence which according to law was a bailable one. Accused No.1 had very small role to play because he being an unarmed constable either was not supposed to investigate the crime or to inflict arrest on account of failure to execute the bail bond and surety bond by the accused persons. The investigation of the case was with accused No.2 and, therefore

only, he was found with relevant documents, when he was called by P.I., A.C.B., on completion of raid. So, this incriminating circumstance squarely goes against accused. It is not only inconsistent to the innocence of the accused, but it is consistent to the guilt looking to the charges.

35. Accused No.1 is caught when he was going in auto-rickshaw after accepting gratification of Rs.1,000/- from Sureshbhai. There is no material conflict as to the presence of Panch or Sureshbhai so also as to the arrival of accused No.1 on the date of trap i.e. 11th of December and regarding the conversation that had taken place immediately prior to the acceptance of the gratification. He had neither completed the formalities on behalf of accused No.2 of taking bail bonds and personal surety bonds of accused persons nor has insisted for the presence of all the three accused persons though he was the person who had warned the complainant to keep all the

partners present. Otherwise, he would have gone wild or at least would have expressed his displeasure and would have asked the complainant to come down to police station forthwith with the partners present and to see the Head Constable in-charge of the police station / investigation. On the contrary, it is in evidence that Rs.1,000/- were given to him smeared with anthracene powder by Sureshbhai as per instructions given by P.I., Mr.Jadav on demand. It is true that Sureshbhai could have given the signal immediately and Sureshbhai ought not to have shown any lethargy in giving signal to the members of the raiding party, who were in the nearby vicinity. But, there is no conflict in the evidence that the accused No.1 had come in auto-rickshaw and the same was kept waiting and in the very auto-rickshaw he had returned after accepting the amount of bribe. It is stated that better late than never. In the present case, Sureshbhai was little bit late in giving signal, but it has come on record

that auto-rickshaw was intercepted before it could travel long. Each witness is consistent, mainly the Panch witnesses as well as P.I. Mr.Jadav that it was intercepted by the members of the raiding party, they have chased the rickshaw running behind it and Mr.Jadav also moved after calling jeep car which was parked in nearby area. There is clear evidence on record that the rickshaw was stopped and it was brought back to the business premises of the complainant. If, really P.I., Mr.Jadav with the help of Panchas and the complainant as well as Sureshbhai would be intended to show the interception of accused No.1 near the business premises of the complainant, then such a small deviation could have been made conveniently by P.I., Mr.Jadav while drawing second part of Panchnama. On the contrary, the manner in which the interception of rickshaw has been narrated by prosecution witnesses and the second part of Panchnama poses the process of trap more transparent.

36. It is true that rickshaw driver Dattatrey was not examined. It is also true that no experiment with the help of U.V. lamp was done in the auto-rickshaw or on the handle of rickshaw etc. It is also true that it was not impossible to draw the second part of Panchnama at the place where the rickshaw was intercepted. But, ultimately this court should not forget that the act of interception of rickshaw indicates that it must be a small public street. There is no evidence as to the width of the street where the auto-rickshaw was intercepted and stopped. It is also not in evidence that it was otherwise convenient to carry out the second part of Panchnama comfortably because the time was such that number of persons would have gathered and such a situation may hamper the process of drawing the second part of Panchnama, which otherwise needs sufficient care and caution. There was no big difference between the business premises of the complainant and the place where the auto-rickshaw was intercepted. It

is in evidence that it was about 60 to 90 ft. or some what more. So, the rickshaw was rightly brought back to the business premises of the complainant.

37. This is a case where PW No.1 had witnessed the actual transfer / passing of the Muddamal currency notes as bribe amount from complainant to the accused. Evidence of Sureshbhai is found convincing in this regard. Why Sureshbhai was replaced vice the complainant-Laxmanbhai is of course a question. But, according to me this question has been rightly addressed by the prosecution. On the first day, the trap had failed though the accused persons had started preparing surety bond etc. the signature of the Panch and surety was also obtained. If Mr.Jadav finds that Sureshbhai is a man with more confidence and payment of bribe amount by the person who is not shown as accused in the complaint filed by Sales Tax Department may inspire more confidence in the mind of the

accused at the time of accepting the gratification. If the accused No.1 was not really a corrupt police official, then instead of accepting amount from Sureshbhai ought to have started firing Sureshbhai that why all the accused persons, including the complainant and aunt, a lady partner, are not kept present though they have been informed in advance. The amount has been recovered in the presence of Panchas from the conscious position of the accused No.1 and that too from a pant pocket. There is no dispute as to the identity of the Muddamal because it has been proved satisfactorily that the currency notes found / recovered from accused No.1 are the same currency notes that were smeared with anthracene power at the time of drawing first part of Panchnama. Such an argument was not advanced even before this court also.

38. I am not also convinced with the argument that as the second part of the compliant has not been exhibited, it cannot be considered at all

as complaint. The question of reading of the first or second part of the complaint does not arise. Complaint otherwise cannot be read as substantive piece of evidence, is the settled legal position. Without proving formal contradictions, omissions, improvements etc. made by the author of the complaint, the contents of the complaint can be read by the defence side and prosecution can simultaneously read to show the elements of corroboration, if found. In the present case, second part of the complaint that has not been exhibited could have been treated as complaint and FIR, but the same has not been treated as FIR even by P.I., Mr.Jadav. It appears that the same is recorded as further intimation given by the complainant showing scope of laying trap against the accused persons again on the strength of the complaint made earlier. Merely because the first trap had failed and its chapter treated as closed, there was no benefit for Mr.Jadav to revive the complaint by accepting the intimation given by the

complainant on 10th of December. Both the ways were open for P.I., Mr.Jadav. Mr.Jadav could have used the earlier complaint as corroborative piece of evidence, including the Panchnama of unsuccessful trap arranged on 10th of December and register a fresh complaint alleging that the accused No.1 has forcibly taken the amount of Rs.800/- which is said to be an extortion and, therefore, the complainant has come again and has requested him to revive the chapter that has been treated as closed and the intimation given by the complainant could have been tendered in evidence as complaint. In the present case, the second part of the complaint was not read over to the complainant nor the signature of the complainant below the second part of the complaint was obtained. But, this situation does not affect the validity of the prosecution or transparency of the prosecution. There also does not emerge any infirmity which can turn fatal to the prosecution. The intimation given by the

complainant on 11th of December morning was nothing but further intimation, therefore, the contents of the intimation given by the complainant in writing can be made use by the defence side if the defence is not able to bring any material contradiction from this intimation that was reduced in writing. If any exaggeration or improvement is found to have been made by the complainant, then the defence can point out such aspects while developing the argument that the complainant should not be believed on account of infirmities that could be pointed out. In the present case, the version of complainant and his son Sureshbhai were found consistent qua all basic facts placed by prosecution since beginning. Certain improbabilities have been posed before the court. It is possible to narrate the improbabilities pointed out by Mr.Sureshbhai from the first day on which he went to A.C.B. Police Station for lodging complaint. It is very likely that he may have started for A.C.B. Police Station, but

ultimately have decided to go to Camp Hanuman. On return he may have gathered confidence or courage to enter the office of A.C.B. Situation of *"to be or not to be"* comes out in the mind of each individual on certain crucial occasions in life and persons who have asked certain settled questions in the nature of cross-examination that too during the cross-examination, in the atmosphere of the court, such a person may not efficiently place the entire thing in a crystallized manner. Of course, it would be extraneous to comment and, therefore, without giving any weightage, one more probability can be stated and that probability is that the complainant himself may have asked Mr. Jadav that because his body language was lacking confidence, the first trap probably has failed and, therefore, this time if it is permissible and possible, instead of the complainant, his son Sureshbhai can be taken in arranging trap. Mr. Jadav also may have suggested after studying the mental state of the complainant

that this time instead of complainant he may take advantage of the presence of Sureshbhai in arranging the trap again against the same accused. When it is in evidence that Sureshbhai was conversant and aware of the conduct of the accused persons and method and manner in which the accused had behaved on 8th and 9th of December and the conduct of the accused No.1 on 10th at about 8.30 and 9.00 p.m., then status of Somabhai was same to the status of the complainant if the witnesses are notionally categorized.

39. There are no good reasons for this court for saying that the complainant and Sureshbhai both are found unreliable as witnesses. On the contrary, both the witnesses have some strength individually and the evidence of both these witnesses collectively proves the case of the prosecution beyond doubt qua the demand of bribe initially Rs.5,000/- by the accused, which was reduced to Rs.3,000/- at that time both the accused persons were present. On the

day of failure of trap i.e. on 10th of December, both the accused were present. There was no reason for accused No.2 to leave the document blank that was prepared on 10th of December. There was no reason for the accused No.2 to obtain signature of Panch as surety the act of taking signature of Panch as surety and omission of not taking signature of the accused person present and leaving spot by both the accused conveniently, probably they may have smelt something. Both the accused are responsible for demanding the bribe amount and it is difficult for the court to conclude that accused No.2 was not responsible for acceptance of Rs.1,200/- which was initially accepted against demand of Rs.3,000/-. Regarding remaining amount of Rs.1,200/-, the version of the complainant gets corroborated by Sureshbhai. It is true that the method adopted by complainant for collecting Rs.1,200/- when the amount was paid initially does not appear to be very natural. So, the second part of Panchnama drawn on 10th of

December indicates that on that day the complainant was to give gratification of Rs.1,800/-. This figure of Rs.1,800/- impliedly corroborates the recovery of Rs.1,200/- by the accused persons prior to the arrangement of trap on 10th of December.

40. The recovery of Rs.800/- by the accused on 10th night at about 8.30 to 9.00 p.m. automatically reduces the remaining amount of gratification of Rs.1,000/- that remained to be paid. The complainant and Sureshbhai appears to be more genuine witnesses. Otherwise, it was not impossible for the complainant to say that both the accused had come and the amount was handed over to accused No.1. But as the accused No.2 was not there, they have stated the fact accordingly where the prosecution should have examined the wife of the complainant because she is the person, who had parted with the amount on 10th of December is a question posed by Mr.Shah. According to him, her examination would have added some

more strength to the case of the prosecution. But, non-examination of these witnesses i.e. wife of the complainant has not weakened the case of the prosecution at all. On her examination the defence could have argued that she being the wife of the complainant, she has supported the case of the prosecution and that she might have been tutored by the complainant accordingly. So, there is no reason for this court to say that the finding recorded by the learned Trial Judge is perverse or illegal qua the demand of bribe of Rs.5,000/- made by both the accused persons and its reduction to Rs.3,000/- and so also as to recovery of Rs.1,200/- by both the accused persons on the very day on which the demand of gratification was made. There is a clear distinction between the evidence, contradictory and the evidence not in conformity. A witness who has stated a particular fact may not be stated by the other witness for some reason. Then at the most, it can be said that a fact as stated by a witness does not get corroboration from

the other witnesses. When the settled law is that un-corroborated testimony is found trustworthy and the same is able to hear the ring of truth, then it can be accepted by the court and the say of that witness can be accepted as reliable. In the same way, one fact may be stated in a different way and in a different context by the other witness, therefore, the courts have developed a concept which is being addressed as that degree of corroboration and when the court is able to observe that version of a particular witness can be accepted subject to some corroboration from other evidence may be oral or documentary then only the court is supposed to find out such corroboration. Here the evidence of complainant as well as Sureshbhai both are of the nature for which the court is supposed to ask that whether these witnesses get corroboration from any other witness. Both these witnesses are competent to corroborate each other and they have corroborated each other in material particular. It is likely

that the degree of corroboration forthcoming may vary in each case. The documents viz. the first part of Panchnama drawn for the trap arranged on 10th of December and so also the second part of Panchnama and the complaint treated as complaint for the purpose of framing accusations satisfactorily corroborate these two witnesses. In the same way the learned Judge has rightly observed that there is no scope of discussionary evidence of panch witnesses.

41. The panch witness is not a trap witness. A question has been posed as to why Mr.Jadav has selected some panchas and Mr.Jadav has admitted to explain the justification is sought that as the earlier trap had failed and from the same compliant a fresh trap was to be arranged he had called the same persons as panch witnesses and there is no bar in calling same panchas. For the sake of argument, the explanation of Mr.Jadav is treated as not convincing, then also, according to me it is

not possible for the court to reach to a finding that this is a case of either selected panchas or a case wherein selection of panchas has resulted into serious prejudice to the accused persons. There is nothing on record to show that any of these two panch witnesses viz. the complainant or his son Sureshbhai is said to have any identification with any witness that both were government servants. Selection of panchas was made by Mr.G.K.Desai and not by Mr.Jadav and the trap was not successful. So, how can one say that the persons selected by Mr.G.K.Desai is special selection of Mr.Jadav is again would become a question which needs to be answered. Papers of trap arranged by Mr.G.K.Desai was made available to Mr.Jadav by Mr.Desai himself. It is discussed herein above that under which circumstances first trap was laid by Mr.G.K.Desai. One question was asked to by Mr.G.K.Desai by the defence counsel that PW No.1 Dalpatbhai Somabhai has tendered panchnamas (Exh.20) drawn on 10th of December

and 11th of December respectively and this witness was examined as PW-3. Mr.G.K.Desai, P.I. was examined as PW No.4. Mr.G.K.Desai, P.I., was examined as PW-4. So these two crucial panchas were available on record duly proved by panch witnesses Dalpatbhai Somabhai. Now when Mr.G.K.Desai has already stated before the court that the papers regarding trap arranged on 10th of December by him were sent to Mr.Jadav in the morning of 11th and Mr.Desai has also stated that he was all throughout there on 11th of December in the office. P.I., Mr.Desai has stated that he cannot say whether Mr.Jadav on 11th December was not knowing that on 10th of December the trap was arranged against the very accused persons had failed. No suggestion was made on such a similar nature to Mr.Jadav though Mr.Jadav has been examined as PW-5 after Mr.G.K.Desai. After sending papers, the question of the trap arranged on 10th, in the morning of 11th of December whether Mr.Jadav had acquired knowledge about failure of the

trap of 10th December could have been said only by Mr.Jadav. Mr.G.K.Desai was not competent to answer such question and on such type of answers. The Trial Judge who disallowed the question put to a witness who is apparent as first sight is not found. On such evidence the court would not say that on second day also Mr.Desai would have undertaken the duty to lay the trap. On the contrary, the laying of trap on 11th of December by Mr.Desai would not create a shadow of doubt. Argument could have been advanced that Mr.Desai was out to trap the accused persons and, therefore, though Mr.Jadav, the officer authorized to lay trap in city area was available, Mr.Desai retained the papers with him and laid trap as he was interested in the success of the trap. So, the act of laying trap on 11th of December rather adds transparency. So, the evidence of Mr.G.K.Desai and Mr.Jadav collectively gives a strong corroboration to the witnesses regarding their evidence about demand of bribe amount and so also about its acceptance.

42. There is no strength in the argument of Mr. Shah that the complainant in the present case and also PW-2 Sureshbhai will accomplish and their testimony could have been evaluated as testimony of accomplish. The learned Judge has given some reasons that the complainant had parted with the amount on two different occasions under some threat and coercion. This finding is legal and proper. A crucial question before treating a witness as accomplish requires to be addressed is whether the payer was or was not a free agent in offering the bribe and it has been held the degree of corroboration required is not in each case the same. In other words, the person coerced into the payment requires less corroboration to his testimony than one was entirely voluntary accomplish as laid down in case of **Balwant Kaur vs. Union Territory, Chandigarh** reported in AIR 1988 SC 139.

43. In the present case, at least Sureshbhai as

well as complainant are required to be treated as witnesses who were under threat of arrest and his other two partners that too in a non-bailable offence. For want of legal education, large number of people are living under apprehension and fear of law enforcing agency and, therefore, they are being exploited. Lack of knowledge may be there even in an uneducated person. Some times, the contents of the complaint are not made known, then a person also may be apprehend something wrong against him if he is asked to appear in police station. Here, in the present case, it is in evidence that once the complainant had visited the police station with his lawyer appearing for him in the sales tax matters, but they had returned with empty hands and without any information about the nature of complaint filed by Sales Tax Department. At the most, the advocate practicing on Sales Tax side may have informed the complainant that most of the offences under the act are bailable and, therefore,

they should not be afraid of any harsh action from the police. But, it would be highly improper or illegal to observe that Sureshbhai as well as complainant had legal assistance they would not have parted with any amount to the complainant even on demand. There was no reason for the complainant to go to Naroda Police Station with his lawyer practicing on taxation side. This by itself exposes that the complainant is ignorant of criminal law. This conduct of the complainant does not make him unreliable. Therefore, I am not inclined to accept the argument of Mr. Shah that fear expressed by the complainant and Sureshbhai before the court during the deposition is nothing but an exhibition of unreal and imaginary and certain exaggerations have been made by these witnesses to win the sympathy of the court. Even the exaggerations made by these witnesses are bracketed and ignored, then also it is satisfactorily established by the evidence of these two witnesses that they were put under fear and, therefore, only they

had immediately contacted their advocate appearing in the Sales Tax matters and the lawyer was taken to the police station.

44. There is some force in the say of Mr.Shah that learned Trial Judge has at some placed made observations dehors the facts. The part of the judgment was read over to the court and those observations are reflected in the memo of appeal also. In ground (b) one observation made by the learned Judge is reproduced, which reads as under :

“Corrupt employees have no moral standards. They are full of vices. They are ready to play with the prestige and moral of the family members of suppressed person for their small monetary gain. A person giving threat of such immoral behaviour can not be so easily forgotten, may be his description can not be given”.

45. In para (c) one another observation is quoted by the appellants where the learned Trial Judge has observed as under :

“It is not unknown that even in the bailable cognizable offence the person may

be detained for about 24 hours as it is their power to detain them".

46. Third observation is made in ground (e) of the memo of appeal, which reads as under:

"The answer to all these question is only one and that the accused intended to create a situation and a fear in the mind of PW.1 that his father and the brother's wife will be taken in custody and will be dealt with illegally. This fear in the mind of PW.1 in my option can not be said to be imaginary and unreal one".

47. Certain similar observations have been read over to the Court. But it is difficult for the court to say that the language used by the learned Trial Judge in above quoted observations would not make the observations unwarranted. On the contrary, the observations quoted in ground (e) referred to herein above sounds good. However, the observations made in grounds (b) and (c) sounds unwarranted and they are based on extraneous considerations. But this by itself would not make the judgment / ultimate finding bad or illegal. The judgment of conviction

under challenge is not based on sympathy towards complainant and his family or anguish towards police personnel who have been found behaving contrary to law.

48. The learned Trial Judge has rightly raised presumption against accused No.1. It is true that there is no cogent and sufficient evidence to raise presumption against accused No.2 because he was not present at the time when Rs.1,000/- was accepted by accused No.1. But the acceptance of the amount of rs.1,000/- was part of the amount demanded by both the accused initially i.e. Rs.3,000/- But as per the settled legal position, the proof has to the actual acceptance of the illegal gratification is one of the basic requirements to raise the presumption under Section 4 of the Act, but it is not possible for the court to observe that the presumption against the accused No.2 also ought not to have been raised. Accused No.1 has hopelessly failed in rebutting the presumption. Mr.Shah has tried

to submit that there is no legal and convincing evidence qua the presence of anthracene powder marks on the recovery of the amount from the accused cannot be said to be established beyond doubt. No presumption could have been drawn against the accused No.1 is the basic thread of the argument, but as observed earlier there is sufficient evidence as to the recovery of the amount from the accused. The assistance of scientific data collected while drawing panchnama by Mr.Jadav is nothing but an additional evidence. The demand and acceptance has been satisfactorily proved by Sureshbhai as well as panch witnesses and there is no material conflict in the version. Mr.Jadav of course has not stated anything about his past experience of using anthracene powder and the characteristics of the power and power marks. The witnesses have described anthracene powder marks mainly panch witnesses in their own way. In the areas where the power marks were seen have been described by these witnesses.

Examination of auto-rickshaw with the help of U.V. lamp would have added more strength to the case of the prosecution as observed earlier, but the same has not weakened the case. The recovery of the Muddamal currency notes from accused No.1 has been proved satisfactory by the prosecution. It is not necessary to state the actual language used in the present judgment by Sureshbhai, Mr.Jadav and panch witnesses.

49. Whether the accused could have been given benefit of doubt is also one of the questions posed before the court and the answer obviously in negative because there is sufficient evidence as discussed earlier in foregoing paragraphs that he was the person present at the time when the amount of Rs.5,000/- was demanded. He is the person in whose presence Rs.1,200/- was taken. He was also the person present when the complainant and his family was put under threat of arrest and remand, who had actually uttered the words

administering threat is relevant because accused No.2 was in-charge of investigation of the complaint. Demand of bribe is also an offence, but in the present case he is a party and a person present when initially Rs.1,200/- was accepted. It is true that house of the accused was searched, but nothing was recovered from his house. Recovery of the amount from the residence of the accused No.1 sounds same doubt. It may be a case of some over doing by Mr.Jadav. While testing the legality and validity of the order of conviction and sentence this court is concerned more with the evidence as to the demand and acceptance of the Muddamal currency notes of Rs.1,000/-. So, the panchnama of recovery of other amount from accused No.1 does not make the case doubtful. According to him, recovery of the amount has not added any strength in the facts of the prosecution and non-recovery of any incriminating amount or article from accused No.1 would not have destroyed the case of the prosecution. The

court is supposed to look into the charge and the nature of allegation made against both the accused and the evidence led to prove these charges. According to me, this court should ignore some observation made by learned Trial Judge while recording finding of guilt. But, this court will have to say that the ultimate finding of guilt recorded by the learned Trial Judge is legal and there is no element of perversity. No finding other than guilt could have been inferred. A reasonable officer like Mr.G.K.Desai would not have sent the papers through a peon to Mr.Jadav is an argument advanced by Mr.Shah, but the same is not found convincing. Officer can send papers with a person of his confidence, rank or the status of the person is not relevant. However, Mr.Desai finds a person suitable and a man of confidence, then he can sent papers to Mr.Jadav through that person. He may be a peon or he may be a responsible officer of the rank of Sub-Inspector working under him. In a given case, he may decide to hand over papers

personally. The learned Trial Judge has considered each aspect, including the conduct of the accused on each information when the business premises or the house of the complainant was visited by the accused persons and mainly the conduct of accused No.1. It is in evidence that on one occasion the accused had taken scooter bearing No.GTM-2828, meaning thereby the accused had developed tenancy to exploit the situation and, therefore, only the learned Trial Judge has held that in the present case the complainant and Sureshbhai are not required to be treated as accomplices at all. In the same way, one document recovered from the portfolio of accused No.2 which is shown at Sr. No.3 of list Exh.22 indicates that auto-rickshaw driver Dattatrey was in close contact of police personnel of Naroda Police Station and mainly accused No.2. This document is a chit which was to be handed over to auto-rickshaw driver Dattatrey and the auto-rickshaw driver was asked to see Head Constable Gandaji at his room on 18th of

December, 1986. Meaning thereby, it was an advance vardi. In such situation non-examination of Dattatrey of auto-rickshaw driver becomes immaterial. So the argument advanced on this count also found not convincing.

50. Complainant-Laxmanbhai has identified both the accused as police officials, who had visited and demanded the amount bribe or Rs.5,000/- and as discussed earlier, the prosecution has satisfactorily clarified about the reference of name of one Somabhai and so the court is not in a position to observe that this is a case where the ACB officer who ought to have arranged Identification Parade keeping all the police personnel posted under Naroda Police Station present. For the sake of argument, if it is accepted that one police personnel was already having name of Somabhai then the question would be why the complainant or his son Mr.Sureshbhai or Mr.Jadav would implicate Gandabhai vice Somabhai falsely. Ultimately,

the complainant and his son were aggrieved by the method and manner in which they were handled and threatened for arrest and other serious consequences like police remand etc. It is observed by our courts that complainant under temptation implicate more number persons, but would not leave real culprits.

51. Merely because the trap had succeeded on second attempt does not make the prosecution case doubtful. As the chapter was treated closed by Mr.Desai on 10th of December, the Muddamal currency notes of Rs.1,800/- were required to be returned to the complainant. At that time, instead of handing over Muddamal currency notes smeared with anthracene powder the amount was arranged by Mr.Desai and that currency notes having no stains of anthracene powder were returned to complainant, and therefore only, the complainant had brought fresh notes of Rs.1,000/- and those notes were again smeared with anthracene powder, as mentioned in the first part of panchnama drawn

on 11th of December. The change of currency notes of Rs.1,800/- by Mr.Desai is not found unusual, as alleged. The complainant has categorically denied that the panchas were selected and they were known to Mr.Jadav. It is not the say of the accused nor is it suggested specifically to either complainant or Sureshbhai that the accused named in the Sales Tax complaint were not even ready to give surety or has refused to execute the bail bond and personal bond. On the contrary, they were eager to have enlargement, therefore, only the complainant had taken his sales tax practitioner with him to the police station before going to A.C.B. Police station. Whether the PW-2 was present when the first part of panchnama was drawn on 11th which also can be said to be third part of panchnama of entire exercise would not affect the case. It is true that there is some element of conflict qua the agreed signal given to Sureshbhai and Panch by P.I., Mr.Jadav and reference of auto-rickshaw put by witness in his deposition

before the court after lapse of long period is matter of surprise. There are three possibilities; firstly the witnesses may have refreshed their memory as they were to depose before the court after lapse of long period so that they can say the truth. The second possibility is that as the driver of auto-rickshaw of Dattatrey had played a vital role in the incident, the witness may have remembered the number of vehicle. In many occasions it is possible with the memory power of a person individually; and the third possibility is tutoring. Close reading of the evidence of Sureshbhai and panch witness does not create any impression that any of them was tutored before entering in the witness box. Getting the memory refreshed is the privilege and a person who uses such privilege cannot be equated with a person tutored.

52. It is true as discussed in earlier paragraphs of the judgment, PW-2 Sureshbhai could have given signal as per instruction immediately

and the accused could have been cornered prior to his boarding in auto-rickshaw that he has brought. But, it is difficult for the court to criticize either panch or Sureshbhai for behaving abnormally. The question posed that why Sureshbhai and other members ultimately ran after the accused, which is not required to be answered by prosecution. It was an individual conduct. Sureshbhai may have thought that he has taken more than reasonable time in giving signal and under the excitement he might have run. It is true that Sureshbhai was given specific instruction to initiate talk about money demanded by the accused and the manner in which he should initiate the talk. Sureshbhai had not acted as per the instruction is a fact, but the evidence of panch witnesses clearly reveals that on arrival, accused No.1 had inquired immediately about the father i.e. Laxmanbhai from Sureshbhai and, therefore, he was supposed to answer that question. According to panch, thereafter the money was demanded by accused

No.1. So it would not be proper for the court to say that the conduct of Sureshbhai is doubtful or strange at that point of time. Witness Sureshbhai and panch witness have described the signal by using two different vernacular Gujarati words i.e. 'udras' and 'khokhara'. The Gujarati word 'udras' means cough, meaning thereby, he had given intimation by way of coughing and the panch says that signal was given by making 'khokhara', which means gargling (horse voice). These two different versions look apparently different, but in reality it cannot be said to be a conflict in the evidence of these two witnesses. This is a minor discrepancy and obviously the court is supposed to ignore the minor discrepancies while evaluating the evidence. Chain of minor discrepancies cumulatively can affect the veracity of a witness, but the number of alleged discrepancies pointed out by Mr.Shah are not able to create such a vital effect.

53. The stand taken by the complainant that on 10th of December night when he was approached again by accused No.1, suddenly he had stated to accused No.1 that money arranged now has been returned to the persons from whom they were borrowed. The attempt is made that this version should not be accepted treating the same as improbable, but on careful reading of the cross-examination made on this point, it is easy to conclude that the reply given by the complainant to accused No.1 at that point of time may be a tricky answer because his ultimate goal was to see that extortion of amount is prevented and if possible, the accused is trapped while extorting money or he may be right also while in answering in that manner. This is not found helpful to the accused in any way. Clothes of the accused also would have been found on various parts of the body through U.V lamp experiment is a proposition based on hypothesis. Such stains may be there or may not be there. It depends how the accused had behaved or acted with his

body after accepting the amount. Though there is some force in argument of Mr.Shah that certain parts of panchnama have been considered as substantive piece of evidence though that particular part of panchnama has not been specifically proved by Panchas. These parts even if are ignored, the case placed by the prosecution is found proved beyond reasonable doubt and, therefore, the ultimate finding of guilt and conviction ought to have been upheld.

54. For the reasons aforesaid, this court is of the view that the finding of guilt recorded by learned Trial Judge is found absolutely legal. The conviction recorded on certain sound reasons and it required to be upheld for the additional reasons and grounds mentioned in the present judgment and order. The prayer to grant benefit of doubt to accused No.2 by way of alternative argument is also not found acceptable and, therefore, the appeal should be dismissed and accordingly, it is dismissed.

55. Of course, no formal submissions have been made on the point of quantum of punishment. But, this court cannot ignore some judgments delivered in recent past reducing the substantive sentence in a case where the court has upheld the conviction under Section 161 of the Indian Penal Code and also under Section 5(1)(d) r/w. Section 5(2) of the Act. No minimum punishment is prescribed for any of these two offences found proved. There is no question of reducing the amount of fine imposed, but the substantive sentence obviously can be reduced because ultimately the court is dealing with a case instituted in the year 1988. This is about 20 years old matter and the accused shall have to go to prison. So, adopting the reasons assigned by this court in the decisions **(a) in the case of Ramanlal Chhotalal Sanghavi v. State of Gujarat, rendered on 25th April, 2007 in Criminal Appeal Nos.268 and 274 of 1991 and (b) in case of Natvarlal Vallabhbhai Prajapati**

v. State of Gujarat, rendered on 02nd March 2007, by this Court (Coram:C.K. Buch, J) in Criminal Appeal No.360 of 1989, the substantive sentence in the present case is also required to be reduced.

56. In view of aforesaid observations and discussion, the present appeal is hereby partly allowed. The judgment and order of conviction dated 20.12.1989 passed by the Special Judge, City Civil Court, Ahmedabad in Special (ACB) Case No.48 of 1988, is hereby confirmed and the judgment and order of sentence dated 20.12.1989, passed by the learned Special Judge, City Civil Court, Ahmedabad, in Special (ACB) Case No.48 of 1988, is hereby reduced and modified to the extent that instead of 2 years' RI and to pay a fine of Rs.3,000/- and in default to undergo RI for 9 months for the offence punishable under Section 161 of the Indian Penal Code and to undergo sentence of 2 years RI and to pay a fine of Rs.3,000/- and in default to undergo

RI for 9 months for the offence punishable under Section 5(1)(d) r/w. Sec.5(2) of the Act, both the appellants now shall undergo RI for 3 months for both the offences and in default punishment for each of these offences imposed i.e for a period of 9 months is reduced to 1½ months. As the appellants have already paid the amount of fine, the order of sentence qua fine remains unaltered so far as both the aforesaid offences are concerned. The substantive sentence is ordered to run concurrently. However, since the appellant No.2-accused has expired, therefore, no formal order directing the accused No.2 to serve the sentence is passed.

57. As the appellant No.1 is enjoying bail, at present, he should be given some reasonable time to surrender and, therefore, the appellant No.1 is directed to surrendered himself on or before 23rd July, 2007 to serve the sentence, failing which the learned trial Court shall issue a non-bailable warrant against the appellant No.1 to secure the

custody of the appellant No.1 so that he can be sent to jail for serving the sentence. The bail bond of the appellant No.1 shall stand cancelled.

(C.K.BUCH, J.)

*pvv